NO. 48324-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARCUS REED,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Michael Schwartz, Judge

BRIEF OF APPELLANT

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2. The trial court erred in denying appellant's motion for severance.

3. Admission of improper opinion testimony violated appellant's right to a jury trial.

4. There was insufficient evidence to support the convictions of second degree assault.

5. Prosecutorial misconduct in closing argument denied appellant a fair trial.

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7. Imposition of a persistent offender sentence deprived appellant of his Sixth and Fourteenth Amendment rights to a jury trial and due process.

8. Classification of appellant's prior convictions as sentencing factors rather than elements deprived him of equal protection guaranteed by the state and federal constitutions.

9. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. The codefendant's out of court statement to police implicated appellant, and even with the State's redactions, the only reasonable inference the jury could have drawn was that the statement referred to appellant. Where the codefendant did not testify and appellant had no opportunity to cross examine his statement, did the court's denial of appellant's motion to sever and its admission of the redacted statement violate appellant's right of confrontation?

2. Over defense objection the court permitted the State's witness to testify that based on what she heard and saw she figured appellant and the codefendants intended to commit a robbery. Where this testimony served only to convey the witness's opinion as to appellant's intent and guilt, did its admission deny appellant a fair trial?

3. Is reversal and dismissal required where there was insufficient evidence to prove the essential elements of second degree assault beyond a reasonable doubt?

4. Did the prosecutor commit repetitive misconduct during closing argument by misstating the law, improperly applying the puzzle analogy to reasonable doubt, and impugning defense counsel?

5. Is reversal required where cumulative error denied appellant his constitutional right to a fair trial?

6. Were appellant's Sixth and Fourteenth Amendment rights to a jury trial and due process violated when a judge, not a jury, found by a preponderance of the evidence that he had two prior most serious offenses, elevating his punishment from the otherwise-available statutory maximum to life without the possibility of parole?

7. The Legislature has enacted statutes authorizing greater penalties for specified offenses based on recidivism. In certain instances the prior convictions are labeled "elements," requiring they be proven to a jury beyond a reasonable doubt, and in other instances they are termed "aggravators" or "sentencing factors," permitting the judge to find the prior convictions by a preponderance of the evidence. Where no rational basis exists for treating similarly situated recidivist criminals differently, does the arbitrary classification deny appellant equal protection?

8. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Marcus Reed with first degree murder, first degree robbery, two counts of second

degree assault, first degree burglary, and first degree unlawful possession of a firearm. The State also alleged that Reed or an accomplice was armed with a firearm during the charged offenses. CP 47-50. The case proceeded to a joint trial with codefendant Damien Davis before The Honorable Michael E. Schwartz. The jury found Reed not guilty of robbery but entered guilty verdicts on the remaining counts. CP 400-10. The court found Reed to be a persistent offender and sentenced him to life without the possibility of early release. CP 579. Reed filed this timely appeal. CP 547.

2. Substantive Facts

Donald Phily was shot in his motel room on March 29, 2013. RP 164, 182. One bullet went through his chest, fired from four to six inches away. RP 531. He died of the gunshot wound. RP 532. Only one shell casing was found at the scene, inside the open door of the motel room. RP 214, 257. A box cutter was found in Phily's right hand. RP 207, 256.

Four people were charged with Phily's murder: Daniel Davis, Damien Davis, Ariel Abrejera, and Marcus Reed. Daniel[1] and Abrejera entered plea agreements and gave statements. RP 1011-12, 1391. Davis gave a recorded statement after his arrest minimizing his involvement and

[1] For the sake of clarity, Daniel Davis will be referred to by his first name, and co-defendant Damien Davis will be referred to as Davis.

implicating Reed as the instigator. Exhibit 70B. The case proceeded to trial against Davis and Reed.

Various accounts were given at trial of what occurred at motel. Kelsey Kelly testified that she was staying with Phily at the motel in March 2013. Phily sold drugs from the motel room, and she spent her time using methamphetamine and heroin. RP 324-26, 346. Kelly and Davis have a child together, and on the afternoon of March 28, Davis stopped by the motel to talk to Kelly about their son. RP 326, 359. At the time, all of Phily's electronics were out in the open in the room, as well as some heroin. RP 327-27.

Kelly testified that Davis was there for about ten minutes, and she used heroin after he left. RP 328. She went to sleep, and the next thing she remembered was waking up around midnight to someone banging on the door. Phily and two other people were in the room, trying to figure out who was at the door. RP 329-30. She heard someone say it was Keith. Phily was angry, and he told them to leave. RP 331-32. The door then opened, a gunshot went off, and Phily stumbled to the floor. Kelly saw two people come into the room. She did not see a gun, and she didn't get a good look at the people because she ran into the bathroom. RP 334.

As she was crouching by the bathroom sink, one of the people came in and asked her where everything was. RP 335. That person had a

gun in his hand. RP 335. He ran out of the bathroom when she was unable to answer him. RP 335-36. Kelly left the bathroom, finding that the two men were gone. RP 337. Rather than waiting to talk to police, she grabbed a few things from the room and ran. RP 337. She testified that the whole situation was scary because someone got shot. RP 342.

Mark McGlothlen was also in the room when Phily was shot. His girlfriend, Kathy Devine, was a good friend of Phily's, and she was catching up with him after being in the hospital. RP 366. McGlothlen testified that when there was a knock at the door, Phily got upset and told the person to go away. Phily was pacing around and looking out the window. He got a funny look on his face and went to the back of the room. RP 372-73. Kelly then went to the door and told the people to go away, but when she turned the door knob, the door flew open. RP 375. According to McGlothlen, one man came into the room, and the man behind him shot Phily. RP 376. McGlothlen said that after Phily fell to the floor the shooter put a gun in his face and said to give him everything he had, while the other person had Devine and Kelly gather the electronics. RP 377. They asked Kelly where the stuff was, and she said in the bathroom. RP 378. McGlothlen saw them load things into a wicker basket, which the non-shooter took. RP 378-79. McGlothlen thought Phily had grabbed a box cutter after he looked out the window. RP 382.

He also thought the shooter was at least ten feet from Phily when he fired the gun. RP 393.

Kathy Devine testified that while she and McGlothlen were visiting Phily at the motel room, they heard a knock at the door, and Phily looked out the window. He yelled that if they kept knocking there would be trouble. He then went into the bathroom and retrieved a box cutter. RP 423, 434, 438. The door flew open, and two men were inside as soon as Phily turned around. RP 440. One man was right next to Phily with a gun. As he and Phily fought over the gun, the gun went off. RP 441. Devine testified that the second man held a gun against McGlothlen's head. RP 442. After the gun went off, the man who shot Phily started gathering up electronics. RP 444. Devine testified that the man was holding a gun, and it was pointed at her, but he didn't mean to point it. He was more interested in gathering items and getting out of the room. RP 445. She was shocked, angry, and scared. RP 445-46.

Devine gave police a description of the men in the room. RP 456. She testified at trial that police took her to a show-up that night where they had detained two people. RP 471. She positively identified one man as the shooter, even though police were later able to determine he wasn't involved. RP 471, 1634. She admitted that she would have identified anyone the police showed her. RP 471, 482. At trial she identified Davis

as the shooter. RP 461. Devine was the only witness to indicate that there were two guns involved in the incident. RP 1720.

Daniel Davis, one of the men who entered the motel room, testified under a pela agreement. He provided yet another version of what happened in the motel. Daniel Davis testified he was in the motel room with Reed when Phily was shot. RP 726. He testified they were there to rob Phily and that Davis and Abrejera were involved as well. RP 727. Daniel testified that he had known Reed about five years. Reed was married to Danielle Evans, and he drove a yellow Crown Victoria with a black door as well as a white Nissan SUV. RP 720-31. Daniel testified that on March 28, 2013, Reed asked him and Davis to help his sister move. RP 735. Later that day Davis spoke to his son's mother, Kelly, to set up a visit with his son. With Daniel in the car, Reed drove Davis to the visit. Davis went inside the motel while Daniel and Reed went into the Rite Aid next door. RP 740-42.

After leaving the motel, they started talking about robbing someone. Their original plan was to rob a man who was attempting to buy some Percocet from Davis, but that deal never materialized. RP 743, 745. Davis told the others that Phily had electronics, drugs, and money in the motel room, and they started talking about robbing him. RP 745. At some

point in the day Reed and Davis went to retrieve a gun from Reed's house. RP 749. Daniel took possession of the gun when they returned. RP 751.

Abrejera, a good friend of Reed's, was brought in on the robbery plan so she could drive them. RP 753, 755. Reed, Davis, and Daniel picked her up at her apartment in the Crown Victoria, and she did the driving from there. RP 756. Davis did not want to go to the motel room, since Phily would recognize him, so Daniel and Reed were left to carry out the robbery. RP 761. Daniel still had possession of the gun as they drove to the motel, but he testified that Reed wanted the gun back once they arrived. RP 762. Davis told them what room to go to and to use the name Keith to gain access to the room. RP 765.

Abrejera parked at the Rite Aid, and Daniel and Reed walked to the motel. They knocked and asked for Keith. According to Daniel, the plan was for him to go in first, then Reed would follow brandishing the gun. RP 766-67. When they knocked on the door, Phily told them to go away. Eventually Phily opened the door and Daniel pushed his way in. RP 767-68. Daniel testified that he and Phily started to scuffle. Phily was trying to throw Daniel to the ground, and Daniel was in fighting mode. They were both swinging, when the gun went off and Phily fell to the floor. RP 769-70. Daniel was inside the room, and Reed was still in the doorway, when the gun went off. RP 777. Daniel testified that he and

Reed kept apologizing, then they gathered up some electronics and ran to the car. RP 776-80. Once in the car, Daniel noticed his arm was bleeding. RP 780. He testified that he thought a bullet had grazed him. RP 790. He never saw the box cutter in Phily's hand. RP 791. The medical examiner had testified when shown a photograph of Daniel's wound that it was a sharp force injury which could have been caused by a box cutter but could not have been from a bullet graze. RP 535.

They drove back to Daniel's sister's apartment. Daniel's sister and her roommate were there, and Daniel testified that Reed started bragging about what happened. RP 797-98. They divided the items taken from the motel room between them. RP 804-05. Daniel took the gun back from Reed and hid it in his room. RP 811. Abrejera returned to the apartment the next day and retrieved the gun. RP 816.

Daniel testified that he fully participated in the incident with no pressure from anyone, although he had initially lied to police, saying Reed coerced and threatened him. RP 834-36. He wanted police to believe Reed had forced him into a situation he wanted nothing to do with so that he might get favorable treatment. RP 839. He told the police and a lot of other people that a bullet fired by Reed grazed his arm before hitting Phily. RP 840, 844. He admitted, however, that unlike Reed who stayed in the doorway, he got within a foot of Phily. RP 851-52. He said that

Phily was in an aggressive mood, ready to fight, and he charged into the room ready to fight Phily. RP 976.

There were also differing accounts about what happened after the incident. Crystal Palamidy, a friend of Daniel and his sister, testified that she was present at the apartment for some of the conversations that night. RP 1075-77. She noticed that Daniel had an injury to his arm, and she asked what happened. RP 1092-93. She heard Reed, Daniel, and Abrejera talk about a robbery that had gone bad. RP 1094-95. Reed said he needed to switch cars because the police would be looking for his car. He and Abrejera left at some point in Reed's yellow Crown Victoria, and he returned in a silver SUV. RP 1097-98. Palamidy said she learned that a gun and accidentally been fired during the robbery. Daniel told her he was not aware Reed had a gun with him, that Reed used the gun to get people out of the room, that Reed fired the gun three times, and that his arm was grazed by one of the bullets. RP 1101-02. Palamidy testified that the next morning Daniel was in shock when they found out Phily had died, but Reed seemed proud of what happened, saying he had never shot a gun before. RP 1109.

Shawn Conklin, a friend of Daniel's sister, was also in the apartment that night. RP 1159. He testified that he was asleep in the living room when Daniel, Davis, Reed, and a woman he had not met

before came in. RP 1167. They were carrying a cardboard box with a lot of electronics. RP 1169. Reed was talking about how they got the dude, and Daniel was getting his arm patched up. Davis remained quiet. RP 1171-72. No one said where the items came from, and when Conklin woke up the next morning they were gone. RP 1173, 1175. Conklin did not recall Palamidy being in the apartment that night. RP 1189.

Daniel's sister, Melynda Davis-Orr, testified that Daniel, Davis, and Reed were at her apartment that day talking about wanting to rob somebody. RP 1210-12. They left that evening, and she went to bed. When she woke up during the night she saw that Daniel was injured. He told her he was stabbed in the arm with a knife, but she thought it was a gunshot wound. RP 1213. The next day, she saw a basket full of electronics that she had not seen before. RP 1218-19. Daniel showed her a news story about a shooting at a motel, and he said he, Davis, and Reed had done it. RP 1222. He told her that Reed had a gun and somebody grabbed him from behind, making him pull the trigger, and he ended up shooting Daniel in the arm and Phily in the stomach. RP 1222.

Ariel Abrejera also testified under the terms of a plea agreement. She said that Reed was one of her best friends. RP 1294. He called her the evening of the incident and said he was going to stop by her apartment. She met him in the parking lot in his Crown Victoria. Daniel and Davis

were in the back seat. Reed asked her to drive somewhere, and they gave her directions while she was driving. RP 1296-99. Daniel and Davis were talking about a robbery, and Abrejera assumed she was driving them to commit it. RP 1300, 1303. Davis instructed her to park in front of the Rite Aid, and Daniel and Reed got out of the car and headed toward the motel. RP 1303-04. About a minute later she heard a faint pop and Reed and Daniel returned to the car. RP 1308. Daniel was holding a wicker basket. RP 1309. Abrejera was told to drive back to Daniel's apartment, and she heard Davis ask Daniel if he was okay, but there was no other conversation during the drive. RP 1310-12. When they got to the apartment Abrejera asked Reed to take her home. RP 1313.

The next day Abrejera returned to Daniel's apartment, where Daniel handed her a backpack containing the gun used at the motel. He told her to get rid of it. RP 1379-80. Abrejera, who was driving Reed's Crown Victoria, placed the backpack in the trunk and left it there for a couple of days. RP 1382-83. Then she moved the gun to a different bag, drove to a park, and hid it in the woods. RP 1387-89.

Abrejera testified that she has remained close friends with Reed since this incident. At some point after she entered her plea agreement, they wrote to each other that their feelings had become romantic. After Reed told Abrejera that his wife had left him, he said he wanted to have a

future with her, and she told him she felt the same way. RP 1392-93, 1402-03.

A group of children found the gun Abrejera had hidden in some woods. They showed it to a neighbor who called the police. RP 1453-54, 1499-1500. It was taken into evidence. RP 1503. Forensic analysis later determined it was the gun that killed Phily. RP 1535. No fingerprints were found on the gun. RP 409. The gun had been purchased by Reed's father-in-law in 1988. RP 1547, 1555. Reed's wife stored it in their bedroom, and the night of the incident she noticed it was missing. RP 1555, 1587.

Reed stipulated that he had a previous conviction for a serious offense and was prohibited from owning or possessing a firearm. RP 1748. The defense argued in closing that the State had gone to great lengths to prove that Daniel was not the shooter, even cutting a deal with him. RP 1822. But the evidence showed that the gunshot was inflicted from about four inches away, where Daniel was struggling with Phily, not from several feet away where Reed was standing in the doorway. RP 1824-25. The evidence showed that Phily did not die when Daniel and Reed were trying to steal from him. He died when he was fighting with Daniel. Phily had a box cutter, and he opened the door ready to fight. He cut Daniel with the box cutter, and in response, Daniel shot Phily. RP

1823. Thus, the death did not occur in the course of the robbery as the murder charge alleged. RP 1824, 1830, 1840.

C. ARGUMENT

1. THE REDACTION OF DAVIS'S STATEMENT WAS INSUFFICIENT TO PROTECT REED'S RIGHT OF CONFRONTATION, AND THE COURT SHOULD HAVE GRANTED REED'S MOTION FOR SEVERANCE.

During the investigation of the shooting, police got information that Damien Davis was possibly involved. RP 669. They located him at the apartment of Melynda Davis-Orr and brought him to headquarters to interview him. After the interview, Davis gave a recorded statement. RP 670-71.

Reed moved to sever the defendants for trial, arguing that the State's use of Davis's statement violated his right of confrontation. Counsel argued that Davis's entire statement to police was about what Reed had said and done, implicating Reed. RP 10, 19. Counsel argued that the redactions proposed by the State were insufficient to prevent prejudice to Reed, because the statement as a whole clearly referred to Reed, and Reed was not able to cross-examine it. RP 19-21, 28. The court ruled that the statement as redacted by the State did not contain any direct references to Reed and therefore use of the statement did not violate the confrontation clause. It denied the motion to sever. RP 42-43.

Reed renewed his objections to the State's use of Davis's statement, arguing that even with the proposed redactions it violated Reed's right of confrontation. RP 505. The court noted Reed's objections for the record and reiterated its ruling that the recorded statement could be played for the jury. RP 507. A redacted recording of Davis's statement was played for the jury. Exhibit 70B. The court instructed the jury it could consider the statement as evidence against Davis but not as evidence against Reed. RP 672-73. Neither Davis nor Reed testified at trial.

a. Reed's right of confrontation was violated by admission of Davis's statement implicating him because he had no opportunity to cross examine Davis regarding that statement.

This Court reviews alleged violations of the state and federal confrontation clauses *de novo*. State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005, review denied, 147 Wn.2d 1025 (2002). A defendant's right to be confronted with the witnesses against him is violated when a non-testifying codefendant's confession naming the defendant as a participant in the crime is admitted at a joint trial. This is true even when the court instructs the jury to consider the confession only against the codefendant who made the statement. Bruton v. United States, 391 U.S. 123, 135-36, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). No confrontation violation occurs when a limiting instruction is given and the non-testifying codefendant's

statement is redacted to eliminate any reference to the defendant's existence. Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).

To comply with Bruton, our Supreme Court adopted CrR 4.4(c), which provides,

> (1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:
>
> (i) the prosecuting attorney elects not to offer the statement in the case in chief; or
>
> (ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

Under this rule, the question is whether the proposed redactions to the non-testifying codefendant's statements are sufficient to eliminate any prejudice to the defendant.

> The question is not the precise words used in a redaction, but whether the redaction is sufficient to protect the codefendant from the prejudice of a statement he cannot cross-examine—that is, to prevent the jury from concluding the redacted reference is obviously to the codefendant, making it impossible for the jury to comply with the court's instruction to consider the evidence only against the defendant who made the statements.

State v. Vincent, 131 Wn. App. 147, 154, 120 P.3d 120 (2005).

In Vincent, there were only two participants in the charged crimes and only two defendants. Substituting "the other guy" for the defendant's name in a non-testifying codefendant's out of court statement was

insufficient to protect the defendant's confrontation rights, because the only reasonable inference the jury could have drawn was that the defendant was "the other guy." Vincent, 131 Wn. App. at 154. Similarly, in State v. Vannoy, 25 Wn. App. 464, 610 P.2d 380 (1980), redacting the names of the crime participants from the codefendant's statement and replacing them with "we" was insufficient because the jury could readily conclude that the defendant was included in the "we" of the non-testifying codefendant's statement. Vannoy, 25 Wn. App. at 474-75. By contrast, in Medina, a redaction replacing two codefendants' names with "other guys" was sufficient where the redacted statement was so ambiguous it was impossible to track the activities of any particular guy, and approximately six people were involved but only three people were charged. Under those circumstances, the statement did not incriminate any one individual. Medina, 112 Wn. App. at 51.

Here, the State redacted Reed's name from Davis's statement and replaced it with "he." This did nothing to prevent the jury from drawing the inescapable inference that Davis was implicating Reed. There were four people charged in the crimes leading to Phily's death: Davis, Daniel, Abrejera and Reed. Davis's statement details the actions of four people in planning and carrying out the charged crimes. Abrejera and Daniel are both named in Davis's statement. For example, Davis says that the gun

came into play when Danny was trying to set up a drug deal, "he" was trying to find someone to rob, and "he" got Ariel to drive for them. CP 247. Davis says in his statement that Ariel drove, "he" sat in the front passenger seat, Davis was behind the passenger, and Danny was behind the driver. CP 252. Back at the apartment "he" kept apologizing for shooting the guy, while Davis and Danny tried to get him to shut up. CP 256. "He" left the gun at Danny and Melynda's apartment while he drove Ariel home. CP 258. The clear implication is that the fourth person Davis talks about is Reed, and substitution of the pronoun "he" for Reed's name did not serve to remove that implication.

Moreover, the statement includes references to facts specifically associated with Reed. For example, there was evidence at trial that Reed, Davis, and Daniel were helping Reed's sister move that day. RP 1557-58. In Davis's statement he said they were helping "his" sister move, and "he" gave the gun to Danny to stash while they were helping her. CP 247-49. In addition, there was evidence that the police identified a yellow Crown Victoria with a black side and front quarter panel as a suspect vehicle. RP 578-79. The car was registered to Danielle Evans, Marcus Reed's wife. RP 603. Reed and his wife also owned a white Nissan Xterra. RP 603, 1553. Reed primarily drove the Crown Victoria, and his wife drove the Xterra. RP 1554. During the move that day, Reed left to take his son

home, driving the Xterra, and later returned to get the Crown Victoria. RP 1563. In Davis's statement, he says they were using "his" black and yellow car, not the white SUV, because "he" had already switched cars with his wife. CP 251. See State v. Fisher, 184 Wn. App. 766, 775, 338 P.3d 897 (2014), review granted in part, denied in part, 183 Wn.2d 1024 (2015) (details in statement allowed jury to conclude the "guy" referred to in the redacted statement could not have been anyone other than defendant).

The only reasonable inference the jury could have drawn was that Reed was the "he" referred to in Davis's statement. Therefore, the trial court erred in denying Reed's motion to sever based on the inadequately redacted statement.

b. Violation of Reed's confrontation right was not harmless.

A confrontation clause error is harmless only if the evidence is overwhelming and the violation so insignificant by comparison that the reviewing court is persuaded beyond a reasonable doubt that the violation did not affect the verdict. Vincent, 131 Wn. App. at 154-55. The violation in this case was not harmless.

Davis's statement gives weight to Daniel's testimony, despite Daniel's significant credibility issues arising from his plea deal and his

history of crimes of dishonesty. Daniel was the only witness identifying Reed as the shooter. Reed argued, based on the forensic evidence, that he could not have shot Phily. Instead, Daniel shot Phily in the course of a fight, not in the course of any planned robbery. Under these circumstances, this Court cannot say beyond a reasonable doubt that admission of Davis's statement implicating Reed and corroborating Daniel's version of events was so insignificant that it could not have affected the verdict. The violation of Reed's confrontation right requires reversal.

2. THE TRIAL COURT IMPROPERLY ADMITTED DAVIS-ORR'S OPINION THAT REED INTENDED TO COMMIT A ROBBERY.

Melynda Davis-Orr testified that she had heard Daniel, Davis, and Reed planning a robbery. RP 1212. On cross exam she admitted she never told police she actually heard anyone say they were going to do a robbery. RP 1248. On redirect she explained that she did not recall anyone saying they were going to do a robbery. She told the detectives that, based on everything she heard and saw, she figured they were going to do a robbery. RP 1266-67. Defense counsel objected to this testimony, arguing that it was improper opinion and infringed on Reed's right to trial by jury. RP 1272. The court ruled that it was proper rehabilitation of a

witness after cross exam and said it would consider a limiting instruction if proposed by the defense. RP 1275.

Reed proposed an instruction limiting the jury's use of Davis-Orr's out of court statement to determining her credibility. CP 333. The court declined to give this instruction, and the defense excepted to the court's ruling. RP 1756. The court indicated it had admitted Davis-Orr's statement as to her state of mind, not as to her credibility. RP 1757. Defense counsel argued that Davis-Orr's state of mind was not relevant and consideration of her out of court statement for that purpose went to the ultimate issue for the jury and was highly prejudicial. RP 1759-60. The court ruled that her state of mind was relevant as circumstantial evidence of the co-defendants' acts and it instructed the jury consistent with this ruling. RP 1760; CP 360.

It is well established that a witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236, 1239 (2009). Improper opinion testimony violates the defendant's constitutional right to a jury trial, because the question of guilt is reserved solely for the jury, and an opinion on guilt, even by mere

inference, invades the province of the jury. Montgomery, 163 Wn.2d at 590; State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

Whether testimony constitutes improper opinion as to the defendant's guilt depends on the circumstances of the case. In making this determination, the court considers such factors as (1) the type of witness, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591; State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009).

In Johnson, this Court reversed the defendant's conviction because the jury was allowed to consider impermissible and highly prejudicial opinion testimony. Johnson, 152 Wn. App. at 926. There, the defendant was charged with second degree child molestation. State's witnesses were permitted to testify about a confrontation between the victim and the defendant's wife, during which the wife said she believed the victim's allegations. Johnson, 152 Wn. App. at 932-33. On appeal Johnson argued that testimony about the confrontation amounted to improper opinion testimony as to his guilt. This Court agreed. Although the State argued that the testimony was admitted only to help the jury assess the wife's credibility, this Court noted that the testimony in actuality demonstrated only what the wife believed about the allegations in the case. The wife's

opinion was not only collateral, but it "served no purpose except to prejudice the jury." Id. at 934. Admission of the improper opinion evidence denied Johnson his constitutional right to a fair trial. Id.

Here, as in Johnson, Davis-Orr's testimony—that she figured Daniel, Davis, and Reed were planning a robbery based on what she heard and saw—constituted an improper opinion on guilt. The trial court indicated that it admitted this testimony to show Davis-Orr's state of mind, because the fact that she believed they were planning a robbery was circumstantial evidence that they were in fact doing so. This is nothing more than an opinion as to the ultimate issue before the jury. It is clearly inappropriate to allow a witness to express her personal belief as to the guilt of the defendant or the intent of the accused. Montgomery, 163 Wn.2d at 591. It was the jury's role to determine whether what Davis-Orr heard and saw indicated the defendants were guilty, and it was improper for the jury to consider Davis-Orr's conclusions on that issue. See also State v. Lahti, 23 Wn. App. 648, 649-50, 597 P.2d 937 (testimony that witness expressed suspicions about defendant's conduct constituted improper opinion, substituting witness's judgment for jury's), review denied, 92 Wn.2d 1036 (1979).

Important to the determination of whether opinion testimony prejudiced the defendant is whether the jury was properly instructed.

Montgomery, 163 Wn.2d at 595. Here, admission of the improper opinion was not remedied by the court's limiting instruction. Over Reed's objection, the court specifically told the jury it could consider Davis-Orr's statement as to her state of mind. CP 360. Her state of mind was relevant only as to her opinion that Davis, Daniel, and Reed intended to commit a robbery. As in Johnson, this collateral opinion testimony served no purpose except to prejudice the jury, and it denied Reed his constitutional right to a fair trial. Reed's convictions must be reversed.

3. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE TWO ASSAULT CHARGES BEYOND A REASONABLE DOUBT.

Pursuant to RAP 10.1(g), Reed hereby adopts the argument on this issue as set forth in the brief filed by Co-Appellant Damien Davis, at pages 19-26.

4. THE PROSECUTOR COMMITTED REPETITIVE MISCONDUCT BY MISSTATING THE LAW, IMPROPERLY APPLYING THE PUZZLE ANALOGY, AND IMPUGNING DEFENSE COUNSEL DURING CLOSING ARGUMENT.

Pursuant to RAP 10.1(g), Reed hereby adopts the argument on this issue as set forth in the brief filed by Co-Appellant Damien Davis, at pages 32-42.

The following additional facts apply to Reed's argument: Reed's defense counsel objected to each of the prosecutor's improper arguments. Counsel objected to the use of the puzzle analogy. RP 1779-80, 1783-84. The court overruled the objection. RP 1785. Reed's counsel objected to the prosecutor's argument that if he was a party to the robbery, it flows naturally that he was guilty of all the charged offenses. RP 1787-88. The court overruled this objection as well. RP 1788. Counsel objected when the prosecutor told the jury not to confuse vigorous advocacy with there being any merit to the defense arguments. RP 1878. The court also overruled this objection. RP 1878.

5. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED REED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The Sixth Amendment to the United States Constitution and article I, section 21, of the Washington Constitution guarantee a criminal defendant the right to a fair trial and an impartial jury. State v. Johnson, 152 Wn. App. 924, 934, 210 P.3d 958 (2009). "Only a fair trial is a constitutional trial." State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981)(citing State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)). Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint of Lord, 123

Wn.2d 296, 332, 868 P.2d 835 (1994). Appellate courts do not need to decide whether these deficiencies alone were prejudicial where other significant errors occurred that, considered cumulatively, compel reversal. Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992).

In this case, the jury heard Davis's out of court statement implicating Reed, which Reed had no opportunity to confront; the jury heard improper opinion testimony regarding his intent on the night in question; the jury convicted Reed of assault despite insufficient evidence; and the prosecutor repeatedly committed misconduct during closing argument. Although Reed contends that each of these errors on its own engendered sufficient prejudice to merit reversal, he also argues that the errors together created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdicts. Reversal of his convictions is therefore required.

6. IMPOSITION OF THE PERSISTENT OFFENDER SENTENCE DEPRIVED REED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A JURY TRIAL.

a. Due process requires that a jury find beyond a reasonable doubt any fact that increases the defendant's maximum possible sentence.

The Fourteenth Amendment to the United States Constitution provides that no person shall be deprived of liberty without due process of

law. U.S. Const., Amend. XIV. The Sixth Amendment also guarantees a criminal defendant the right to a jury trial. U.S. Const., Amend. VI. The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). Together these constitutional clauses guarantee the right to have a jury find beyond a reasonable doubt, every fact essential to punishment, regardless of whether that fact is labeled an "element." Apprendi, 530 U.S. at 490. It violates the constitution "for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id.

An accused's constitutional rights to a jury trial and due process require the government to submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment above the maximum sentence otherwise available for the charged crime. Descamps v. United States, ___ U.S.___, 133 S.Ct. 2276, 2285-86, 186 L.Ed.2d 438 (2013); Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013).

> [A]ny possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding. Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt.

Washington v. Recuenco, 548 U.S. 212, 220, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). Here, the prior convictions found by the court increased Reed's sentence to life without the possibility of parole and were thus elements of the offense which were required to be proved to a jury beyond a reasonable doubt. Alleyne, 133 S.Ct. at 2155 ("Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

b. Reed had the constitutional right to have a jury determine beyond a reasonable doubt that he committed the two prior "strike" offenses because they increased his maximum sentence.

Absent the court's finding, by a preponderance of the evidence, that Reed committed two prior strike offenses, he would not have been subject to a sentence of life without the possibility of parole. The jury verdict for first degree murder, the most serious offense he was convicted of, does not support this sentence standing alone. RCW 9.94A.510 (sentencing grid). Because the facts used to impose the sentence of life

without parole were not found by a jury beyond a reasonable doubt, Reed's Sixth and Fourteenth Amendment rights were violated.

Any argument that there is a "prior conviction exception" to the rule overlooks important distinctions and developments in United States Supreme Court jurisprudence. See Apprendi, 530 U.S. at 489.

First, the Supreme Court has implicitly overruled the case on which this supposed exception was based, Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). In Apprendi, the Court recognized that "it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested." Apprendi, 530 U.S. at 489. The Court therefore treated Almendarez-Torres as a "narrow exception" to the rule that a jury must find beyond a reasonable doubt any fact that increases the statutory maximum sentence for a crime. Id.

A member of the 5-justice majority in Almendarez-Torres, Justice Thomas, has since retreated from the majority holding. His Apprendi concurrence noted extensively the historical practice of requiring the State to prove every fact, "of whatever sort, including the fact of a prior conviction," to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 501 (Thomas, J., concurring). As Justice Thomas noted, "a majority of the

Court now recognizes that Almendarez-Torres was wrongly decided." Shepard v. United States, 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (Thomas, J., concurring). Moreover, although the continuing validity of Almendarez-Torres was not before the Court in Alleyne, Justice Thomas further emphasized his retreat from the holding in authoring Alleyne. Alleyne, 133 S.Ct. at 2155, 2160 n.1.

Even if Almendarez-Torres has precedential value, it is distinguishable on several grounds. First, in Almendarez-Torres, the defendant had admitted the prior convictions. Apprendi, 530 U.S. at 488. Reed did not admit his prior convictions. Second, the issue in Almedarez-Torres was the sufficiency of the charging document not the right to a jury trial or proof beyond a reasonable doubt. See Apprendi, 530 U.S. at 488; Almendarez-Torres, 523 U.S. at 247-48. Third, Almendarez-Torres dealt with the "fact of a prior conviction." Apprendi, 530 U.S. at 490. Here, the simple "fact" of the prior convictions did not increase Reed's punishment; rather, it was the "types" of prior convictions that mattered. To impose a life sentence under the POAA, the State must prove the defendant has been convicted of "most serious" offenses on two prior occasions. RCW 9.94A.030(37); RCW 9.94A.570. Fourth, the Almendarez-Torres court noted the fact of prior convictions triggered an increase in the maximum permissive sentence: "[T]he statute's broad

permissive sentencing range does not itself create significantly greater unfairness" because judges traditionally exercise discretion within broad statutory ranges. 523 U.S. at 245. Here, in contrast, the alleged prior convictions led to a mandatory sentence of life without the possibility of parole, a sentence much higher than the top of the permissive standard range. RCW 9.94A.570. Thus, the constitutional concern here resembles Alleyne, in which the Court held that any fact that increases a mandatory minimum sentence must be proved as an element, more than Almandarez-Torres. Alleyne, 133 S.Ct. at 2155. Accordingly, even if Almandarez-Torres were still good law, it would not apply here.

Although the Washington Supreme Court has rejected the argument Reed makes here, subsequent United States Supreme Court cases clarified the meaning of the Sixth and Fourteenth Amendment rights set forth in Apprendi and invalidated our State's intervening case law. State v. McKague, 159 Wn. App. 489, 246 P.3d 558 (2011) (Quinn-Brintnall, J., dissenting) (citing Blakely v. Washington, 542 U.S. 296, 303-04, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Cunningham v. California, 549 U.S. 270, 281-88, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)). Under recent United States Supreme Court Cases, the "prior conviction exception does not apply in cases where the trial court wishes to impose a sentence in excess of the statutory maximum without a supporting jury verdict." Id.

at 535. This Court should follow United States Supreme Court precedent and hold that prior "strike" offenses must be proved to a jury beyond a reasonable doubt.

c. Because the sentence of life without parole was not authorized by the jury's verdict, the case should be remanded for resentencing within the standard range.

The imposition of a sentence not authorized by the jury's verdict requires reversal. State v. Williams-Walker, 167 Wn.2d 889, 900, 225 P.3d 913 (2010) (reversing sentence enhancement where jury not asked to find facts supporting it, even though overwhelming evidence of firearm use was presented). The jury did not find beyond a reasonable doubt the facts necessary to support the sentence of life without the possibility of parole imposed upon Reed. His sentence should be reversed and remanded for the imposition of a standard range sentence.

d. In the alternative, under the traditional Mathews procedural due process analysis, proof to a jury beyond a reasonable doubt is required to confine an accused to life without parole under our State constitution.

In the alternative, this Court should hold that a procedural due process analysis under Mathews v. Eldridge requires that a POAA sentence be imposed only if the prior serious offenses are found by a jury beyond a reasonable doubt. The government may not deprive a person of

life, liberty, or property without due process of law. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. A procedural due process claim requires the court to balance three factors. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). First, the court must consider private interest at stake. Second, the court looks to the risk of erroneous deprivation under the existing procedure and the probable value of additional or substitute procedures. Third, the court regards government's interest in maintaining the existing procedure. Id.

Under the first factor, the accused has a strong private interest at stake in persistent offender proceedings. Where a proceeding may result in confinement, the private interest at stake is the most elemental of liberty interests—liberty. This interest is "almost uniquely compelling." Hamdi v. Rumsfeld, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); Ake v. Oklahoma, 470 U.S. 68, 78, 105 S.Ct. 1087, 84 L.Ed.2d 3 (1985). The unparalleled importance of this interest is demonstrated by the significant procedural safeguards required when a person's freedom is at issue. For example, a court may not impose confinement for failure to pay in a civil contempt case absent (1) notice that ability to pay is critical to the proceeding; (2) a form eliciting relevant financial information; (3) an opportunity to respond to questions about financial status; and (4) an express judicial finding regarding that the defendant has the ability to pay.

Turner v. Rogers, 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011). Similarly, a person may not be subject to involuntary civil commitment absent proof by clear and convincing evidence. Addington v. Texas, 441 U.S. 418, 433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

The private interest in avoiding a term of life without parole—the harshest punishment except for death—is greater than in most situations involving loss of freedom. Thus, the punishment at issue here weighs heavily in favor of additional procedural safeguards. Nonetheless, the current procedure—judicial fact finding by a preponderance of the evidence—creates a significant risk of error. A preponderance of the evidence is a mere more likely than not finding. A standard greater than a preponderance of the evidence is required when significant interests are at stake. E.g., United States v. Ruiz-Gaxiola, 623 F.3d 684, 691-692 (9th Cir. 2010) (requiring a clear and convincing standard to protect the "significant liberty interests" implicated by an involuntary medication order); Addington, 441 U.S. at 433. Furthermore, "it is presumed, that juries are the best judges of facts." Georgia v. Brailsford, 3 U.S. 1, 4, 3 Dall. 1, 1 L. Ed. 483 (1794). Juries are well-equipped to evaluate documentary evidence, witness testimony, and expert opinion. The possibility of even occasional error under the current procedure argues in favor of a higher standard of proof and the empanelment a jury.

Such additional procedures would also benefit the government. The State has two significant interests in ensuring the accuracy of persistent offender sentencing proceedings. First, prosecutors have a duty to act in the interest of justice, and thus cannot seek the wrongful imposition of life without parole. Second, the State's scarce resources should not be wasted incarcerating people for life if they do not qualify as persistent offenders.

In sum, the balancing test in Mathews shows that prior strike offenses must be proved to a jury beyond a reasonable doubt in POAA cases to comport with article I, section 3. Mathews, 424 U.S. at 333. On this alternative basis, Reed's sentence of life without parole should be vacated and the case remanded for a new sentencing hearing. Id.

7. CLASSIFICATION OF THE PERSISTENT OFFENDER FINDING AS AN "AGGRAVATOR" OR "SENTENCING FACTOR," RATHER THAN AN "ELEMENT," VIOLATES REED'S RIGHT TO EQUAL PROTECTION.

The equal protection clauses of the state and federal constitutions require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. U.S. Const., Amend. XIV; Wash. Const., art. I, § 12; Bush v. Gore, 531 U.S. 98, 104-05, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000); State v. Thorne, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1994). A statutory classification that implicates physical

liberty is subject to rational basis scrutiny unless the classification also involves a semi-suspect class. Thorne, 129 Wn.2d at 771. The Washington Supreme Court has held that "recidivist criminals are not a semi-suspect class," and therefore the rational basis test applies. Id

> Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. The classification must be "purely arbitrary" to overcome the strong presumption of constitutionality applicable here.

State v. Smith, 117 Wn.2d 263, 279, 814 P.2d 652 (1991).

The classification at issue here violates the Equal Protection Clause because it is not rationally related to a legitimate government interest.

Our legislature has determined that the government has an interest in punishing repeat criminal offenders more severely than first time offenders. For example, defendants who have twice previously violated no-contact orders are subject to significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Likewise, defendants who have twice previously been convicted of "most serious" (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(37); RCW 9.94A.570. However, courts treat prior offenses

that cause the significant increase in punishment differently simply by labeling some "elements" and others "sentencing factors."

Where prior convictions that increase the maximum sentence available are classified as "elements" of a crime, they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. And the State must prove to a jury beyond a reasonable doubt that a defendant has four prior DUI convictions in the last ten years in order to punish a current DUI conviction as a felony. State v. Chambers, 157 Wn. App. 465, 475, 237 P.3d 352 (2010). In none of these examples has the legislature labeled these facts as elements; the courts have simply treated them as such.

Where, as here, prior convictions that increase the maximum sentence available are classified as "sentencing factors," our state only requires they be proved to the judge by a preponderance of the evidence. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) (two prior strike

offenses need only be proved to judge by a preponderance of the evidence in order to punish current strike as third strike), cert. denied, 541 U.S. 909 (2004). Just as the legislature has never labeled the facts at issue in Oster, Roswell, or Chambers "elements," the legislature has never labeled the fact at issue here a "sentencing factor." Instead, in each instance it is an arbitrary judicial construct. This classification violates equal protection because the government interest in either case is exactly the same: to punish repeat offenders more severely. See RCW 9.68.090 (elevating "penalty" for communication with a minor for immoral purposes based on prior offense); RCW 46.61.5055 (person with four prior DUI convictions in last ten years "shall be punished under RCW ch. 9.94A"); Thorne, 129 Wn.2d at 772 (purpose of POAA is to "reduce the number of serious, repeat offenders by tougher sentencing").

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the "three strikes" context but not in other contexts, because the punishment in the "three strikes" context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. However, it makes no sense to say that the greater procedural protections apply where the

necessary facts only marginally increase punishment, but need not apply where the necessary facts result in the most extreme increase possible.

As an example, if a person is alleged to have a prior conviction for first-degree rape, the State must prove that conviction to a jury beyond a reasonable doubt in order to use the conviction to increase the punishment for a current conviction for communicating with a minor for immoral purposes—even if the prior conviction increases the sentence by only a few months. Roswell, 165 Wn.2d at 192. But if the same person with the same alleged prior conviction for first-degree rape is instead convicted of rape of a child in the first degree, the State need only prove the prior conviction to a judge by a preponderance of the evidence in order to increase the punishment for the current conviction to life without the possibility of parole. RCW 9.94A.030(37) (b) (two strikes for sex offenses); RCW 9.94A.570; Smith, 150 Wn.2d at 143.

As the United States Supreme Court explained in Apprendi, "merely using the label 'sentence enhancement' to describe the [second act] surely does not provide a principled basis for treating [the two acts] differently." Apprendi, 530 U.S. at 476. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." Skinner v. Oklahoma, 316 U.S. 535, 542, 62 S.Ct. 1110, 86 L.Ed.2d 1655 (1942). This Court should hold that the imposition

of a sentence of life without parole, based on the trial court's finding of the necessary facts by a preponderance of the evidence, violated Reed's right to equal protection. This case should be remanded for sentencing within the standard range.

8. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO IMPOSE APPELLATE COSTS.

The trial court entered an order of indigency finding that Reed was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 568-70. In addition, the trial court found Reed was unlikely to have the ability to pay LFOs in the future and imposed only the mandatory LFOs. RP 1935.

a. **The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.**

Our supreme court in Blazina recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the

impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Blazina, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id.

The Blazina court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate

costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Reed has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The Blazina court also expressly rejected the State's ripeness claim that "the proper time to challenge the imposition of an LFO arises when the

State seeks to collect." Blazina, 182 Wn.2d at 832, n.1. Blank's questionable foundation has been thoroughly undermined by the Blazina court's exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." Blazina, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals . . . *may* require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State's requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State's requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Reed respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

b. **Alternatively, this court should remand for superior court fact-finding to determine Reed's ability to pay.**

In the event this court is inclined to impose appellate costs on Reed should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. At any such hearing, this court should direct the superior court to appoint

counsel for Reed to assist him in developing a record and litigating his ability to pay.

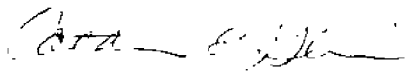
If the State is able to overcome the presumption of continued indigence and support a finding that Reed has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

For the reasons argued above, this Court should reverse Appellant's convictions. This Court should also decline to impose appellate costs should the State substantially prevail on appeal.

DATED July 15, 2016.

Respectfully submitted,



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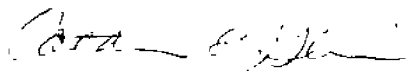

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